No. 17-155

IN THE

Supreme Court of the United States

ERIK LINDSEY HUGHES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR DOUGLAS A. BERMAN IN SUPPORT OF PETITIONER

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January 29, 2018

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INTEREST OF *AMICUS CURIAE*[1]

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SUMMARY OF THE ARGUMENT

The standard presumption in favor of finality for criminal judgments need not and should not be elevated over other critical criminal justice interests when a defendant seeks only to modify an ongoing prison sentence based on new legal developments. See Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 Wake Forest J.L. & Pol'y 151, 174–75 (2014). Through sentence-modification provisions like the one at issue in this case, see 18 U.S.C. § 3582(c)(2), Congress has expressed its concerns for those other criminal justice

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[1] The parties have granted consent to the filing of this brief. Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

interests by creating a significant sentencing exception to the usual presumption in favor of finality. Appreciating the importance of getting sentences right while an offender is still serving a prison term, Congress has astutely elevated substantive sentencing goals like accuracy, fairness, and uniformity over concerns about finality in this context. Section 3582(c)(2) serves well the purposes of fitness and fairness: its sentence-modification provisions eliminate unwarranted disparities in federal sentencing, promote the government's legitimate substantive penological interests, foster societal respect for the criminal justice system, and save long-term costs associated with excessive terms of incarceration.

The question of statutory interpretation presented in this case, *i.e.*, what does the term "based on" mean, should be resolved in favor of clear congressional policy and purpose. Defendants who commit crimes of similar severity under similar conditions should receive similar sentences. When it is functionally apparent that a particular amended guideline was applicable in a defendant's case, it ought not matter whether that defendant's plea agreement contained calculations applying the since-reduced guideline. A contrary interpretation, one that unnecessarily narrows eligibility for relief under § 3582(c)(2), would turn congressional policy on its head, wrongly elevate finality interests over those Congress sought to champion, and lead to systemic injustice. The Court should take this opportunity to embrace a broad interpretation of "based on" that comports with overriding congressional policy. Accordingly, petitioner should be eligible for relief under § 3582(c)(2) because his sentence was "based on" a Guidelines range that has been subsequently lowered.

ARGUMENT

I. SECTION 3582(c)(2) DEMONSTRATES THAT CONGRESS PRIORITIZES SUBSTANTIVE SENTENCING CONCERNS OVER FINALITY WITH RESPECT TO FEDERAL PRISON SENTENCES.

Ordinarily, when direct appellate review comes to a close, "a presumption of finality and legality attaches to [a criminal] conviction and sentence." See *Brecht* v. *Abrahamson*, 507 U.S. 619, 633 (1993) (citing *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983)). That general rule applies equally to federal and state criminal judgments. 18 U.S.C. § 3582(b); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("The Federal Government, no less than the States, has an interest in the finality of its criminal judgments.").

But Congress can decide how much weight should be given to finality interests for federal convictions and sentences. It has, in a handful of scenarios, therefore specifically prioritized other substantive concerns over finality interests for certain federal criminal sentences. As this Court recognized in *Dillon* v. *United States*, 560 U.S. 817 (2010), "Section 3582(c)(2) establishes an exception to the general rule of finality." *Id.* at 824; see S. Rep. No. 98-225, at 121 (1983) ("The approach taken [in this subsection] keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations.").

Under § 3582(c)(2), "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" may move for a sentence reduction. If that eligibility requirement is satisfied, the district court then has discretion to "reduce the

term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2); see also *Freeman* v. *United States*, 564 U.S. 522, 526 (2011) (plurality opinion) ("[T]he rule of finality is subject to a few narrow exceptions," including "a statutory provision enacted to permit defendants whose Guidelines sentencing range has been lowered by retroactive amendment to move for a sentence reduction if the terms of the statute are met.").

The statute establishes a two-step inquiry. First, the district court must determine whether a prisoner is eligible for a sentence modification and, if so, the extent of the reduction authorized. See *Dillon*, 560 U.S. at 827. At step two of the inquiry, the district court considers the § 3553(a) sentencing factors to determine whether, in its discretion, the particular defendant is fit for a sentence reduction. *Id.*

Two additional provisions reversing the presumption in favor of finality are also contained in § 3582(c). First, on a motion by the Director of the Bureau of Prisons, a district court may reduce a term of imprisonment "if it finds that . . . extraordinary and compelling reasons warrant such a reduction" or "the defendant is at least 70 years of age, has served at least 30 years in prison, . . . is not a danger to the safety of any other person or the community, . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." See 18 U.S.C. § 3582(c)(1)(A). Second, a district court may "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." *Id.* § 3582(c)(1)(B); see Fed. R. Crim. P.

35(b)(1) ("Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.").

II. SENTENCE-MODIFICATION PROCEEDINGS PROMOTE SENTENCING FITNESS AND FAIRNESS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM.

The Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, ch. II, 98 Stat. 1987, was intended to "increase transparency, uniformity, and proportionality" in federal sentencing. *Dorsey* v. *United States*, 567 U.S. 260, 265 (2012). Accordingly, Congress established "an independent commission in the judicial branch" for purposes of "establish[ing] sentencing policies and practices" that provide "certainty," promote "fairness," and avoid "unwarranted sentencing disparities." 28 U.S.C. § 991. The United States Sentencing Commission was, for like reasons, instructed to promulgate uniform Sentencing Guidelines and instructional policy statements. *Id.* § 994(a). The Commission was further directed to periodically "review and revise" the Guidelines, see *id.* § 994(o), and, at certain other intervals, "promulgate" and submit "amendments" to Congress, see *id.* § 994(p). The SRA's "comprehensive sentencing scheme" ensures, in one way or another, that "those who commit crimes of similar severity under similar conditions receive similar sentences." *Freeman*, 564 U.S. at 533 (plurality opinion).

Section 3582(c)(2) likewise reflects a broad congressional concern for fairness in federal sentencing. According to the relevant Senate Report, the SRA's sentence-modification provisions were considered vital "safety valves." S. Rep. No. 98-225, at 121. The value

of provisions like § 3582(c)(2), the Senate Report explained, was to "assure the availability of specific review and reduction of a term of imprisonment for 'extraordinary and compelling reasons' and to respond to changes in the Guidelines." *Id.* As the Senate Report suggested, society's interest in finality necessarily recedes "if there is a major downward adjustment in the Guidelines because of change in the community view of the offense." See *id.* at 180. By allowing prisoners to seek modification of their ongoing imprisonment based on significant new legal or social developments, Congress has elevated substantive sentencing goals like accuracy, fairness, and uniformity over concerns about finality. See *Dillon*, 560 U.S. at 828 ("[Section] 3582(c)(2) represents a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines."). Members of this Court therefore have, for good reason, described § 3582(c)(2) as a mechanism designed to "remedy systemic injustice." See *Freeman*, 564 U.S. at 534 (plurality opinion).

A. The Passage Of Time, Though Often Justifying A Stronger Commitment To The Finality Of A *Conviction*, Can Sometimes Justify Modifications Of A *Sentence*.

Ordinarily, the passage of time and the staleness that accompanies it counsel against upsetting an otherwise final criminal conviction: "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, [or] deprive the [parties] of witnesses . . . ." *United States* v. *Marion*, 404 U.S. 307, 321 (1971). For this reason, this Court has been wary of collateral attacks on convictions that would necessitate a new trial requiring the resolution of historical factual issues. See *McCleskey* v. *Zant*, 499 U.S.

467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (citation omitted)).

But sentencing proceedings, unlike criminal trials, include discretionary forward-looking determinations that may actually become better informed with the passage of time. See, *e.g.*, 18 U.S.C. § 3553(a)(2)(C), (D) (requiring sentencing judges to consider at sentencing the need "to protect the public from further crimes of the defendant" and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"). Sentencing calls for reasoned judgment, which balances an array of diverse considerations to impose, going forward, a just and effective punishment. See *Koon* v. *United States*, 518 U.S. 81, 113 (1996) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.").

Thus, in the sentencing context, the passage of time provides an opportunity for societal perspectives on just and effective punishment to evolve, and can in turn enhance the information the sentencing judge utilizes in a particular case.[2] *Cf. Mackey* v. *United*

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[2] In fact, this Court has recently explained, in the analogous context of post-appeal resentencings, how "evidence of [a defendant's] rehabilitation since his initial sentencing is clearly relevant to the selection of an appropriate sentence" because this information "provides the most up-to-date picture of [his]

States, 401 U.S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (discussing the ability of "time and growth in social capacity" to change our understanding of what is necessary to "vitiate the fairness" of a criminal judgment); *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (discussing, in the Eighth Amendment context, "the evolving standards of decency that mark the progress of a maturing society"). Indeed, a sharp and telling modern example of the passage of time altering societal perspectives on just and effective punishment is the changing attitudes toward severe prison sentences imposed on certain non-violent drug offenders. See generally *Kimbrough* v. *United States*, 552 U.S. 85, 94–100 (2007) (discussing the historical treatment of crack and powder cocaine under the federal sentencing laws); see also, *e.g.*, Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (increasing the drug amounts triggering mandatory minimum sentences for crack-trafficking offenses); USSG supp. app. C, amend. 782 (effective Nov. 2014) (reducing the Sentencing Guidelines' offense levels for drug offenses).

B. Sentence-Modification Proceedings Comport With And Enhance The Government's Legitimate Penological Interests.

There is often concern in federal habeas corpus proceedings that collateral review of convictions can "cost society the right to punish admitted offenders" and "may reward the accused with complete freedom from prosecution." See *Engle* v. *Isaac*, 456 U.S. 107, 127–28 (1982). But those concerns vanish where, as

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'history and characteristics.'" *Pepper* v. *United States*, 562 U.S. 476, 491–92 (2011) (quoting 18 U.S.C. § 3553(a)(1)).

here, a prisoner is merely seeking modification of his current prison sentence. As this Court has previously observed, 18 U.S.C. § 3582(c)(2) "authorize[s] only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826. If the prisoner is eligible for relief, only then may the district court re-evaluate the sentencing factors set forth in § 3553(a) and discretionarily decide whether to bestow the "benefit of later enacted adjustments to the judgments reflected in the Guidelines." *Id.* at 828.

By ensuring a given sentence is properly calibrated through this process, sentence modifications can actually further deterrence and other penological goals. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963) ("[I]t is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to . . . *just punishment*." (emphasis added)). Further, sentence-modification proceedings, as designed by Congress, do not detract from the government's interests in incapacitation and retribution. No legitimate penological purpose is served by imposing an unduly harsh sentence. *Cf. Miller* v. *Alabama*, 567 U.S. 460, 477–78 (2012) ("[O]ur individualized sentencing cases . . . teach that in imposing a [society's] harshest penalties, a sentencer misses too much if he treats every child as an adult. . . . This mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.");[3] *Barber* v.

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[3] This Court in *Tapia* v. *United States*, 564 U.S. 319 (2011), held that "a [sentencing] court may not impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." *Id.* at 335. But

Thomas, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting) ("To a prisoner, time behind bars is . . . something real, even terrifying."); *Graham* v. *Florida*, 560 U.S. 48, 73 (2010) ("Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.").

C. Sentence-Modification Proceedings Foster Respect For The Criminal Justice System.

Members of this Court have noted how society's interest in the "finality of criminal judgments" may conflict with a prisoner's interest in "substantial justice." Compare *Frady*, 456 U.S. at 175, with *id.* at 186 (Brennan, J., dissenting). Proponents of finality maintain that it is "essential to the operation of our criminal justice system." See *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); *Mackey*, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part) ("No one . . . is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.").

But sentence-modification proceedings can actually foster respect for the criminal justice system. Transparency dispels concerns that sentences vary arbitrarily and, further, facilitates the evaluation of the merits of particular policies. See *Dorsey*, 567 U.S. at 265 (recognizing that the SRA "sought to increase transparency" in federal sentencing). Scholars have

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nothing precludes a sentencing court from imposing a shorter sentence or reducing a defendant's sentence post-appeal or at the second, discretionary step of a § 3582(c)(2) proceeding based on a defendant's rehabilitation. *See Pepper*, 562 U.S. at 490–91.

highlighted various ways that undue emphasis on finality concerns over other substantive sentencing goals can harmfully undermine society's perception of the criminal justice system as both fair and legitimate. See Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79, 161 (2012) ("Allowing people to continue to serve years of extra prison time despite a plain error in their sentence undermines the legitimacy of the criminal justice system—particularly when some racial or ethnic groups are disproportionally impacted by lengthy federal sentences and recidivist enhancements."); see also Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah L. Rev. 561, 589 ("[S]tudies have shown that compliance with the law in everyday life is motivated primarily by an internalized sense that obeying the law is the right thing to do, even when doing so is inconvenient.").

D. Sentence-Modification Proceedings Can Save Long-Term Institutional Costs Associated With Incarceration.

When a court determines that a sentence can and should be reduced under § 3582(c)(2), the federal fisc benefits because the government no longer needs to pay for a period of incarceration that a judge has decided is no longer just and effective. It costs, on average, approximately $32,000 per year for the federal government to incarcerate an individual. See Annual Determination of Average Cost of Incarceration, 81 Fed. Reg. 46,957, 46,957 (July 19, 2016). There is no sound fiscal reason for federal taxpayers to continue paying for a prison sentence based on Guideline provisions that the U.S. Sentencing Commission has decided to revise and that a federal judge has decided

no longer serves an essential penological purpose for a particular defendant.

Nor need this Court be too concerned with increased litigation costs if § 3582(c)(2) eligibility were expanded. As noted earlier, a § 3582(c)(2) proceeding is "not a plenary resentencing proceeding." *Dillon*, 560 U.S. at 826. Circuit courts have held that defendants seeking § 3582(c)(2) relief have no right to counsel[4] and no right to an in-court hearing.[5] To this end, the record relating to petitioner's sentence-reduction request is typically discrete: the defendant files a

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[4] *See United States* v. *Webb*, 565 F.3d 789, 795 (11th Cir. 2009) (per curiam) ("[T]here is no statutory or constitutional right to counsel for a § 3582(c) motion or hearing . . . ."); *compare also United States* v. *Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (per curiam) (holding that § 3582(c)(2) movants have no statutory right to counsel because § 3582(c) motions are not "ancillary matters" within the ambit of the Criminal Justice Act (18 U.S.C. § 3006A(c)), *United States* v. *Reddick*, 53 F.3d 462, 464–65 (2d Cir. 1995) (same), *and Webb*, 565 F.3d at 795 (same), *with United States* v. *Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (finding no Sixth Amendment right to counsel in connection with § 3582(c)(2) motions because "the constitutional right to counsel extends only through the defendant's first appeal"), *United States* v. *Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (same), *and United States* v. *Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009) (same).

[5] *See United States* v. *Lightfoot*, 626 F.3d 1092, 1096 n.13 (9th Cir. 2010) ("[T]he law does not require the district court to allow" a § 3582(c)(2) movant "to put in a personal appearance."); *see also, e.g.*, *United States* v. *Figueroa*, 714 F.3d 757, 760–61 (2d Cir. 2013) (per curiam) ("[a] defendant need not be present" when "[t]he proceeding involves the correction of a sentence under Rule 35 or 18 U.S.C. § 3582(c)" (quoting Fed. R. Crim. P. 43(b)(4)); *United States* v. *Howard*, 644 F.3d 455, 458–59 (6th Cir. 2011) (no abuse of discretion where district court did not hold a § 3582(c)(2) hearing because Federal Rule of Criminal Procedure 43(b)(4) provides no right of allocution).

written motion (often *pro se*), the government files a written response, and the court issues its ruling.

The unnecessary additional costs of prolonged incarceration and the absence of signigicant offsetting litigation costs from expanding § 3582(c)(2) eligibility provides still further justifications for eschewing any interpretations of § 3582(c)(2) eligibility that unnecessarily limit its sound reach.

III. THE STATUTORY TERM "BASED ON" SHOULD BE INTERPRETED BROADLY TO ACCOMPLISH CONGRESS' REASONABLE GOALS.

Under 18 U.S.C. § 3582(c)(2), "a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission" may be eligible for a sentence reduction. The question of statutory interpretation presented in this case, as in *Freeman*, concerns the term "based on"—that is, whether a sentence imposed pursuant to a binding Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement is "based on" the plea agreement, the Sentencing Guidelines, or some combination of both.

In light of the SRA's creation of the § 3582(c)(2) remedy and overarching goals of prioritizing fairness, transparency, and uniformity over finality in connection with federal sentencing, the term "based on" should be interpreted broadly, as the *Freeman* plurality advocated. As Justice Frankfurter once commented, "the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute." Felix Frankfurter, *Some Reflections on the*

Reading of Statutes, 47 Colum. L. Rev. 527, 539 (1947).

The SRA is not shrouded in mystery. To the contrary, this Court has consistently recognized that the Act was intended to address the problem of "significant sentencing disparities among similarly situated offenders." See *Peugh* v. *United States*, 569 U.S. 530, 535 (2013); see also *Dorsey*, 567 U.S. at 265 (recognizing that the SRA was designed to "increase transparency, uniformity, and proportionality" in federal sentencing); *Freeman*, 564 U.S. at 525 (plurality opinion) (recognizing that the SRA "calls for the creation of Sentencing Guidelines to inform judicial discretion in order to reduce unwarranted disparities in federal sentencing." (citation omitted)); *Koon*, 518 U.S. at 113 ("The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.").

With this understanding of the congressional purpose behind the SRA, there is no reason to limit eligibility for a sentence reduction to an arbitrary subset of defendants based on an overly rigid reading of the simple term "based on." Indeed, any perceived ambiguity in the interpretation of the phrase "based on a sentencing range," see 18 U.S.C. § 3582(c)(2), should be resolved in favor of the defendant and congressional purposes. See *United States* v. *Bass*, 404 U.S. 336, 347–50 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.").

A contrary rule that limits eligibility for sentence reductions would unduly fossilize societal views on punishment in a manner obviously contrary to congressional goals. As one leading commentator has put

it, undue limits on the review of sentences risk "lock[ing] in the worst of our sentencing mistakes." See Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 Fla. L. Rev. 683, 706 (2009). The need to recalibrate the sentences of an obsolete era are particularly appropriate where those sentences resulted in severe and lengthy periods of confinement. Lengthy sentences can fail to stand the test of time, as "growth in social capacity" changes our understanding of what is necessary to "vitiate the fairness" of a criminal sentence. *Cf. Mackey*, 401 U.S. at 693 (Harlan, J., concurring in judgments in part and dissenting in part); see also *Freeman*, 564 U.S. at 533 (plurality opinion) ("[T]he Commission determined that those Guidelines were flawed, and therefore that sentences that relied on them ought to be reexamined."). At bottom, a narrow interpretation of the statute at issue risks turning congressional purposes on its head and transforming the federal sentencing scheme into a "cause of inequality, not a bulwark against it." *Freeman*, 564 U.S. at 525 (plurality opinion).

IV. PETITIONER IS ELIGIBLE FOR A SENTENCE MODIFICATION.

Under a proper interpretation of § 3582(c)(2), petitioner's sentence was "based on" the Sentencing Guidelines. He should therefore be deemed eligible to receive a sentence modification.

As petitioner has explained (Br. at 35–37), the record demonstrates that "[t]he Guidelines were considered throughout [his] plea bargaining and sentencing process." Consistent with the command of USSG § 6B1.2(c) (forbidding the judge from accepting a Rule 11(c)(1)(C) agreement without first giving due consideration to the applicable Guidelines sentencing

range), the parties agreed that the court "will be required to consider" the Guidelines before imposing petitioner's sentence and that the court "has the discretion to depart from those Guidelines." Pet. App. 54a. Similarly, the parties agreed that petitioner's sentencing would involve an "application of the Sentencing Guidelines."[6] *Id.* at 56a.

That is, in fact, what occurred. The Probation Office prepared a presentence investigation report recommending Guidelines calculations to the court. The court expressly "reviewed" that report, its addendum, "the sentencing guidelines," and the parties "comments and objections" to the report. Pet. App. 32a–33a. The court then resolved a dispute over the calculation of petitioner's Guidelines range and expressly calculated petitioner's "total Offense level," "Criminal History Category," and "Custody guideline range." *Id.* at 33a–36a. And in imposing petitioner's sentence, the court expressly decreed that the sentence was "compatible with the advisory United States Sentencing Guidelines." *Id.* at 47a; see also *id.* at 33a (the court remarking that the parties' sentencing stipulation in the plea agreement "complies . . . with the spirit of the advisory United States Sentencing Guidelines.").

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[6] It does not matter, as the district court erroneously found, that petitioner's plea agreement did not contain Guidelines calculations itself. Pet. App. 28a. The district court was required to consider the Guidelines in determining whether to accept the parties' plea agreement and impose their stipulated sentence. Moreover, the absence of Guidelines calculations in petitioner's plea agreement does not mean that the parties reached their sentencing stipulation without considering the Guidelines either. As petitioner has accurately explained, Department of Justice policy requires prosecutors to consider them when negotiating a disposition—no less in Rule 11(c)(1)(C) cases than any other. Pet. Br. 24.

CONCLUSION

For these reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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January 29, 2018

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